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No. 81-45

In the
Supreme Court of the United States
OCTOBER TERM, 1980

In re GERALDINE G. CANNON,
Petitioner.

JOINT BRIEF OF RESPONDENTS THE UNIVERSITY OF CHICAGO, ET AL. AND NORTHWESTERN UNIVERSITY, ET AL. IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF MANDAMUS

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Petitioner Geraldine G. Cannon asks this Court to issue a writ of mandamus to the United States Court of Appeals for the Seventh Circuit based on her contention that the Court of Appeals, in its opinion issued May 6, 1981,[1] affirming the dismissal of her complaints for failure to state a claim, had " 'disobey[ed] and mistake[n] the meaning' of this Court's mandate" issued in No. 77-926, *Cannon* v. *University of Chicago,* 441 U.S. 677 (1979). Specifically, Mrs. Cannon argues that this Court's ruling that she was entitled to assert a private right of action under Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq.,* precluded the District Court and the Court of Appeals on remand from considering any

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[1] *Cannon* v. *University of Chicago,* 648 F.2d 1104 (7th Cir. 1981). A copy of the Court of Appeals' opinion is attached to the Petition at 1a.

other deficiencies in her statement of claim; that the courts below, therefore, could not grant Respondents' motions to dismiss under Fed.R.Civ.P. 12 (b)(6) based upon her failure to plead an essential element of a Title IX action: namely, that Respondents had acted with the purpose and intent of denying her admission to medical school because of her sex.

Respondents The University of Chicago, Northwestern University, and their respective medical school admissions officials respectfully submit that the decision of the Court of Appeals was fully consistent with this Court's mandate and that Petitioner's request should be denied for the reasons set forth herein.

STATEMENT OF THE CASE

Geraldine G. Cannon applied for admission to the September, 1975 entering classes at the medical schools of The University of Chicago and Northwestern University. She was not offered admission to either institution.[2]

On July 18, 1975, she filed her complaint against The University of Chicago and various of its officials, alleging that their failure to admit her violated the Fourteenth Amendment to the United States Constitution, the Civil Rights Act of 1871 (42 U.S.C. §1983), Title IX of the Education Amendments of 1972 (20 U.S.C. §1681 *et seq.*), and the Illinois prohibition against age discrimination (Ill. Rev. Stat., ch. 48, §884 *et seq.*). On August 4, 1975, Mrs. Cannon filed a nearly-identical complaint against Northwestern University and certain of its officials.

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[2] Mrs. Cannon also sought admission to eight other medical schools in 1975 and was not admitted to any of them (Transcript of Proceedings on Plaintiff's Application for a Preliminary Injunction, September 21, 1979, at 74-75).

Subsequently each Defendant moved to dismiss the complaints for failure to state a claim and lack of subject matter jurisdiction, arguing, with respect to her Title IX claims, that the Education Amendments of 1972 do not provide for a private right of action. On September 11 and October 3, 1975, those motions were granted. Mrs. Cannon filed an Amended and Supplemental Complaint in each case, repeating her claims under Title IX and the other statutes. The universities once again moved to dismiss the complaints for failure to state a claim and lack of subject matter jurisdiction. On January 15, 1976, the District Court granted the motions, ruling, with respect to Mrs. Cannon's claims under Title IX, that, "[W]hile the statute provides for judicial review of agency action, it does not authorize a private right of action against the University." *Cannon* v. *University of Chicago,* 406 F.Supp. 1257, 1259 (N.D. Ill. 1976).

On appeal, the Court of Appeals for the Seventh Circuit affirmed the judgment in its entirety. *Cannon* v. *University of Chicago,* 559 F.2d 1063 (7th Cir. 1976). The dismissal of Plaintiff's Title IX claims was upheld because the Court of Appeals concluded, "It is clear that no individual right of action can be inferred from Title IX in the face of the carefully constructed scheme of administrative enforcement contained in the Act." (559 F.2d at 1073).

Mrs. Cannon's petition for a writ of certiorari raised only one issue:

> "Whether section 901 of Title IX, Public Law 92-318, 20 U.S.C. §1681, which prohibits discrimination on the basis of sex in education programs receiving federal financial assistance, is enforceable in a federal civil action by an individual." (Petition for Writ of Certiorari, *Cannon* v. *University of Chicago,* No. 77-926, at 3).

On December 14, 1979, this Court reversed. *Cannon v. University of Chicago*, 441 U.S. 677 (1979). This Court noted at the outset that the Seventh Circuit had held that Plaintiff "has no right of action against respondents that may be asserted in a federal court" and that certiorari had been granted "to review *that* holding." (441 U.S. at 680; emphasis added). This Court concluded that "[P]etitioner does have a statutory right to pursue her claim that respondents rejected her application on the basis of her sex." (441 U.S. at 689). The cases were remanded to the Court of Appeals and then the District Court "for further proceedings consistent with this opinion." (*Id.* at 717).

Each of the universities thereupon filed new motions to dismiss the Amended and Supplemental Complaints in the District Court for failure to state a claim upon which relief may be granted.[3] The basis for the motions was that, although Mrs. Cannon had a private right of action under Title IX, she had failed to allege an essential element of such a cause of action: *viz*, that the universi-

[3] Northwestern University also filed an alternative motion for summary judgment, and The University of Chicago renewed its motion for summary judgment that had been pending since before the initial appeal. Supporting affidavits from The University of Chicago disclosed that there were "at least 2,000 [applicants not offered admission] who had better academic qualifications than did Mrs. Cannon." Affidavits submitted by Northwestern established that "several thousand applicants who were as well or better qualified for admission were also rejected." Thus, the universities contended that Mrs. Cannon could not carry her burden of demonstrating that her rejection was in any way caused by her sex or that she had suffered any injury as a result of any unlawful conduct. The District Court never had occasion to reach these motions because it granted the alternative motions to dismiss.

ties had acted with the purpose and intent of discriminating against her because of her sex. Ruling on these motions was stayed while Mrs. Cannon was granted an emergency six-day hearing on her application for a preliminary injunction, which was denied by the District Court on October 2, 1979. This denial was affirmed by the Court of Appeals on April 25, 1980.[4] The universities then renewed their still-pending motions to dismiss before the District Court. On May 23, 1980, the Court granted the motions and dismissed the Amended and Supplemental Complaints for failure to state a claim.

On appeal, the Court of Appeals affirmed.[5] *Cannon* v. *University of Chicago*, 648 F.2d 1104 (7th Cir. 1981). The Court first considered and rejected the identical argument made by Petitioner here:

> "Applicant asserts that because the [Supreme] Court reversed the prior dismissal of her complaints granted on the ground that she failed to state a claim, the Court implicitly found her complaints to be adequate for the purposes of all further Rule 12(b)(6) motions.
>
> "This contention may quickly be dismissed. The only issue before the Supreme Court on the prior appeal in this case was whether Title IX implied a private right of action. The Court did not consider any other potential ground for dismissal of appellant's

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[4] *Cannon* v. *University of Chicago*, No. 79-2207 (7th Cir., April 25, 1980). The Court of Appeals also denied Plaintiff's Petition for Emergency Writ of Mandamus (*Cannon* v. *Hoffman*, No. 79-2117 (7th Cir., October 16, 1979)) and Application for Extraordinary Writ or Rule Nisi (*Cannon* v. *Parsons*, No. 79-2118 (7th Cir., October 16, 1979)).

[5] Prior to filing her appeal, Mrs. Cannon filed another Petition for Emergency Writ of Mandamus, which the Court of Appeals denied on May 30, 1980. *Cannon* v. *Hoffman*, No. 80-1736 (7th Cir., May 30, 1980).

complaints in its opinion. This was made clear in the opinion of Justice Stevens for the Court:

> Accepting the truth of [appellant's] allegations for the purposes of its decision, the Court of Appeals held that petitioner has no right of action against respondents that may be asserted in the federal court. 559 F.2d 1063. We granted certiorari to review that holding. 438 U.S. 914, 98 S. Ct. 3142, 57 L.Ed. 2d 1159.

Cannon v. *The University of Chicago*, 441 U.S. 677, 680, 99 S. Ct. 1946, 1949, 60 L. Ed. 2d 560 (1980) (footnote omitted). The fact that the Supreme Court and this court assumed *arguendo* the sufficiency otherwise of appellant's complaints for the purposes of the prior appeal does not disallow the appellees' attack on those assumptions here." (648 F.2d at 1106).

The Court of Appeals then ruled that the District Court had correctly interpreted Title IX as prohibiting only purposefully discriminatory acts and had correctly dismissed Mrs. Cannon's complaints because of their failure to allege that her applications to the medical schools of The University of Chicago or Northwestern University were purposefully or intentionally rejected because of her sex. (648 F.2d at 1109).[6]

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[6] In view of its affirmance of the District Court's dismissal for failure to state a claim, it was not necessary for the Court of Appeals to consider the universities' alternate contention that they were entitled to summary judgment. Nonetheless, the Court of Appeals noted that "defendants' argument is persuasive on this issue." (648 F.2d at 1110).

REASONS FOR DENYING THE PETITION FOR WRIT OF MANDAMUS

1. The Court of Appeals Did Not Disobey the Mandate of this Court in Affirming the Dismissal of Petitioner's Complaints for Failure to State a Claim.

Petitioner's Title IX claims were originally dismissed by the District Court solely on the threshold basis that Title IX did not provide for a private right of action. *Cannon* v. *University of Chicago*, 406 F.Supp. 1257, 1259 (N.D. Ill. 1976). The Court of Appeals affirmed the dismissal also on that ground. *Cannon* v. *University of Chicago*, 559 F.2d 1063, 1073 (7th Cir. 1976). This Court expressly stated that its grant of certiorari was "to review *that* holding." *Cannon* v. *University of Chicago*, 441 U.S. 677, 680 (1979) (emphasis added).

For the purposes of determining the existence of a private right of action, this Court observed that the universities' motions to dismiss admitted *arguendo* that Mrs. Cannon had been denied admission to the medical schools because of her sex. (441 U.S. at 680). Thus, in order to frame the question before it, the Court and the parties assumed that Plaintiff had properly pleaded and in fact could prove that she had been the victim of sex discrimination as defined in Title IX.

Nowhere in the Court's opinion was there any ruling that Plaintiff's Amended and Supplemental Complaints sufficiently alleged the essential elements of a Title IX violation. However, Justice Powell in his dissenting opinion (441 U.S. at 748 n. 19) did refer to the elements of such a claim.

> "If Title IX prohibits only purposeful discrimination such as would violate the Constitution were state action involved, a conclusion that seems foregone

> in light of our holding with respect to Title VI of the Civil Rights Act of 1964 in *Regents of the University of California* v. *Bakke*, [438 U.S.] at 284-287 (opinion of Powell, J.); *id.*, at 328-350 (opinion of Brennan, White, Marshall, and Blackmun, JJ.), then the chances of petitioner's proving that the neutral age requirements used by Chicago and Northwestern are unlawful seem infinitesimal."

The sole concern of the Court was whether a private right of action existed. The Justices left it for the lower courts to determine whether Plaintiff's allegations, if proven, would make out a prima facie case.

Consequently, the District Court and the Court of Appeals below properly considered the universities' renewed motions to dismiss and addressed the sufficiency of Petitioner's Title IX allegations. Petitioner's contention that the courts below have "'disobey[ed] and mistake[n] the meaning' of this Court's mandate" (Petition, at 5) is without foundation, and Respondents submit her Petition should be denied.

2. The Court of Appeals Properly Affirmed the Judgment of the District Court Dismissing Petitioner's Complaints because of Her Failure to Allege Purposeful Discrimination by Respondents.

a. Title IX Prohibits Only Purposefully-Discriminatory Conduct.

The Court of Appeals was clearly correct in its holding below that:

> "a majority of the Justices on the Supreme Court as well as other courts that have recently addressed this question in similar circumstances would hold that a violation of Title VI requires an intentional discriminatory act and that disparate impact alone is not sufficient to establish a violation. We shall

therefore adopt that standard under Title IX and evaluate appellant's complaint accordingly." (648 F.2d at 1109).

This Court has established that Title IX was modeled after and must be interpreted consistent with Title VI of the Civil Rights Act of 1964. *Cannon* v. *University of Chicago, supra,* 441 U.S. at 694-709. At least seven members of this Court have recognized that Title VI and, hence Title IX, embodies the constitutional standard of discrimination. *See Regents of the University of California* v. *Bakke,* 438 U.S. 265, 284-287 (1978) (opinion of Powell, J.); *id.,* 438 U.S. at 328-350 (opinion of Brennan, White, Marshall, and Blackmun, JJ.); *Cannon* v. *University of Chicago, supra,* 441 U.S. at 748 n. 19 (opinion of Powell J., dissenting on other grounds); *Board of Education* v. *Harris,* 444 U.S. 130, 160 (1979) (opinion of Stewart, Powell, and Rehnquist, JJ., dissenting on other grounds); *Fullilove* v. *Klutznick,* 448 U.S. 448, 517 n.1 (1980) (opinion of Marshall, Brennan, and Blackmun, JJ., concurring).[7] As the Court of Appeals observed below, decisions of the lower courts issued after *Bakke* have reached the same conclusion. *Cannon* v. *University of Chicago, supra,* 648 F.2d at 1108-09.

This Court has repeatedly held that the constitutional standard of discrimination requires "[p]roof of discriminatory intent or purpose." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S 252,

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[7] In view of these decisions, it is clear that this Court's decision in *Lau* v. *Nichols,* 414 U.S. 563 (1974), insofar as it holds that Title VI prohibits disparate impact-based discrimination, is no longer viable, as four members of the Court noted in *Bakke,* 438 U.S. at 352 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

265 (1977); *Washington* v. *Davis*, 426 U.S. 229, 239 (1976). Contentions that a neutral law or policy has a disproportionately adverse effect on a racial minority or women do not state a violation of the constitutional standard of discrimination, even where such an effect can be anticipated. *See Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 272, 278-79 (1979).

Consequently, the Court of Appeals correctly determined that Petitioner, in order to state a claim under Title IX, had to allege that she was the victim of purposefully-discriminatory conduct.

b. Petitioner's Complaints Were Properly Dismissed because They Contained No Allegations that She Was the Victim of Purposefully-Discriminatory Conduct.

The Court of Appeals correctly determined after its review of Petitioner's complaints that "appellant's cause of action was based solely upon the alleged disparate impact the defendants' age policies had upon women." (648 F.2d at 1109).

The material portion of her identically-worded complaints against The University of Chicago and Northwestern University alleged simply:

> "A material criterion for defendants' denial of plaintiff's application for admission to the September, 1975 entering class at Northwestern Medical School was her age which, in the circumstances of application to medical school, is a criterion disproportionately characteristic of her sex and does not validly predict any lack of success in the education program or activity of the school. This conduct on the part of defendants is in violation of the Civil Rights Act of 1964 . . . as amended by Title IX of the Education Amendments of 1972. . . ." (648 F.2d at 1109).

The District Court granted Respondents' motions to dismiss because, in the court's words, "there are no allegations remotely approaching the purposeful or intentional sex discrimination required to state a claim under Title IX." Rather than moving to amend to correct the deficiency, Petitioner elected to stand on her complaints and appealed, arguing primarily that no such purposefully-discriminatory conduct was required to make out a violation of the statute.[8] The Court of Appeals' construction of Petitioner's allegations was manifestly correct and provides no basis for the issuance by this Court of the petitioned-for writ.[9]

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[8] She argued alternatively that she had satisfied Title IX's pleading requirements with her allegations that the universities had acted "arbitrarily and invidiously," a contention the Court of Appeals properly rejected. (648 F.2d at 1110).

[9] In her petition, Mrs. Cannon states that, "Throughout this litigation, petitioner has sought to prove that the purpose of the schools' age policies was to exclude women and that she was excluded 'because of her sex.'" (Petition, at 9). Petitioner's effort to rewrite history is clearly in error. Her position throughout this case has been that Title IX and the regulations issued by HEW thereunder are violated by facially-neutral policies that have a disparate effect on women and are not predictive of academic success regardless of the purpose for which the policies were adopted.

Petitioner's inability to allege the requisite purposeful conduct as defined in this Court's decisions was clearly demonstrated in the Summary Outline of Position that she submitted to the Court of Appeals in support of her Motion to Amend Complaints or, in the Alternative, to Extend Time for Filing a Petition for Rehearing and Suggestion for Clarification:

> "[P]laintiff consistently has contended that defendants applied their age policies to plaintiff with the intent

CONCLUSION

Respondents The University of Chicago, *et al.* and Northwestern University, *et al.* pray that this Court will deny Petitioner's Petition for Writ of Mandamus for the reasons set forth herein.

Respectfully submitted,

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[9] (Continued)

> — in the sense of voluntariness with an awareness of the consequences on women such as plaintiff who have interrupted education or a career in favor of motherhood — and for the purpose — in the sense of intent as aforesaid and the absence of any legitimate purpose sufficient to justify the discriminatory effect of such age policies on women as an incidental or unavoidable side effect — of discriminating against women."

This construction of the constitutional standard of discrimination was advanced and rejected in *Feeney*, which held that motivation, not forseeability, is the proper test. (442 U.S. at 278-79).